Filed 3/27/19 Lyon v. Garcia CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NEAL I. LYON, Plaintiff and Appellant, v. ANTONIO GARCIA, Defendant and Respondent.	G055762 (Super. Ct. No. 30-2016-00864364) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Roylaw and Derik J. Roy III for Plaintiff and Appellant.

Morasse Collins & Clark and Steven R. Morasse for Defendant and Respondent.

In July 2016, plaintiff Neal I. Lyon, filed a complaint against defendant Antonio Garcia for a continuing nuisance, dating back to 2003. The complaint alleged Garcia illegally operated a construction business and construction storage yard at his residence next door to Lyon's residence. The trial court granted Garcia's motion in limine to prohibit Lyon from introducing evidence of liability or damages outside the two-year statute of limitations provided in Code of Civil Procedure section 335.1.[1] In special verdicts, the jury found in favor of Garcia. Lyon now appeals. He contends the trial court prejudicially erred in so ruling. We disagree and affirm.

PROCEDURAL SETTING

When filed, Lyon's complaint alleged causes of action for a continuing private nuisance, violation of the City of Garden Grove Municipal Code, violation of zoning laws, violation of South Coast Air Quality Management District rule 445, and intentional infliction of emotional distress. The complaint alleged Garcia ran an illegal construction business and construction storage yard at his residence.

Garcia answered and denied the allegations, and alleged four affirmative defenses, including that the claims were barred by the applicable statute of limitations. Before trial, Garcia filed a motion in limine to preclude Lyon from introducing evidence of liability or damages in Lyon's causes of action for continuing nuisance and emotional distress claims beyond the two-year statute of limitations in section 335.1. The court granted the motion in limine, and a jury was selected later that day. On the third day of the trial, Lyon withdrew all his causes of action, except the continuing nuisance claim.

The jury returned special verdicts in Garcia's favor. Specifically, the jury found Garcia did not "by acting or failing to act, create a condition or permit a condition to exist that was harmful to health." The trial court denied Lyon's subsequent motion for a new trial and his request for a permanent injunction. Lyon appeals from the judment.

[1] All undesignated statutory references are to the Code of Civil Procedure.

FACTS

The Motion in Limine

Garcia's motion in limine argued the statute of limitations for personal injury and emotional distress claims was two years and evidence of liability or damages outside that two-year period was irrelevant and should not be admitted as it would be prejudicial to Garcia. The motion was based on section 335.1, and Evidence Code sections 350 (only relevant evidence is admissible) and 352 (court may exclude relevant evidence when it is more prejudicial than probative).

Lyon conceded the two-year statute of limitations applied to his emotional distress claim, but asserted the same statute of limitations did not apply to his continuing nuisance claim. Lyon did not, however, cite any authority for the proposition that section 335.1 did not apply to his continuing nuisance claim. Neither did he allege what statute of limitations did apply. The court granted the motion in limine and precluded Lyon from introducing evidence of liability or damages that purportedly occurred more than two years prior to the filing of the complaint.

Evidence at Trial

Lyon testified he lived next door to Garcia on Lampson Avenue in Garden Grove. He has lived there since March 1994. Lyon said he was at home recovering from surgery in 2000, and noticed "a large amount of commotion coming from [Garcia's] yard." According to Lyon, the activities at the Garcia residence has continued.

Lyon said, on average, he had daily observed approximately six vehicles at the Garcia property from 2015 to 2017. These included pickup trucks with overhead racks and stake bed trucks. Lyon said the trucks carried tubular aluminum, foam coring, ladders, and power tools, and that people who did not live at the residence parked in the

yard of the Garcia residence, or on the street, and "use those vehicles to commute to job sites." He said "hundreds of pounds" of materials were stored on the Garcia property.[2]

Lyon said Tuesdays were particularly bad because the trucks were cleaned on those days and materials were placed in the dumpsters on site. He added that scrap materials were stored on site as well. He said the noise from Garcia's property started at 7:00 a.m. and the trucks returned between 2:00 and 6:00 p.m. with the concomitant offloading of scrap, unused materials, and the crews. He further complained of the use of a miter saw to cut tubular aluminum. He added that approximately four months before trial, he was awakened at 3:30 a.m. by a truck being loaded or unloaded. Lyon had also heard activity at the Garcia property after dark, perhaps as late as 9:30 or 10:00 p.m. He said three to five days a week construction material was loaded and unloaded on the Garcia property. Lyon had also seen a forklift on the Garcia property.

Lyon complained that activity on Garcia's property had forced him to use ear plugs to sleep, and they were uncomfortable. According to Lyon, he was a prisoner in his own house. He had depression in the past and said it became more acute in 2000. For the last 10 years, he had been on medication that "seems to have at least stabilized that a bit."

Lyon stated a November 2015 photograph of a truck with materials on the overhead rack, also showed work being done on the back of the Garcia property. Other photographs were admitted, including one taken in April 2016, showing people working on the property and three vehicles parked thereon. Another taken in 2016, showed dumpsters on the property containing scrap and other materials. The dumpsters were emptied weekly, on Tuesdays.

---

[2] Lyon's counsel sought to introduce evidence of the materials stored on the property from 2000 to 2015, but the court sustained a relevance objection, stating the area of inquiry is limited to July 18, 2014 (two years before the filing of the complaint) through the present.

Prior to July 2014, Lyon contacted the City of Garden Grove Code Enforcement. Lyon's counsel sent Garcia a cease and desist letter before filing of the complaint. Per Lyon, the sunroom to Garcia's residence was removed in July 2015, and completed on August 15, 2015.

On cross-examination, Lyon said he was employed in 2015, and typically left for work at approximately 6:30 a.m., and returned after 7:00 p.m., Monday through Friday. Once a month he travelled on his employer's behalf and was away from his home for a week. The noise on Saturdays was loud enough to wake Lyon up and lasted 30-to-60 minutes.

Garcia testified he was the sole owner of Antonio Garcia Construction, Inc. Its business was installing sunrooms for Patio Warehouse. The business address for Antonio Garcia Construction, Inc. was the same as Garcia's residence on Lampson Avenue. He, two sons, and two grandsons worked for the company installing sunrooms for Patio Warehouse. Garcia said they loaded the trucks at the factory and went straight to the customer's homes. He denied storing materials at his residence. His three pickup trucks were, however, kept at his residence. He explained the construction materials in the photographs of his property only occurred when he tore down the sunroom on his property. He said construction on his property began prior to November 15, 2015, and the photographs show materials from the demolition and other materials for the rebuild.

The new sunroom was not completed by April 2016. Garcia took a year to build the new sunroom by himself; he only worked on it when he was not working at his job. He admitted his trucks would sometimes be unloaded in the afternoon and they would leave from his home for work the next morning.

Bertha Mendoza, Garcia's daughter, lived with her husband and children in an apartment at the rear of her father's property. Uncles and another person lived in the other apartment at the back of the property. She never saw her father operate a construction business or operate a storage yard on the property. She had never seen him

load or unload his trucks at the property for business purposes, but she had seen him load and unload for personal purposes. Her father never conducted any activities on the property which interrupted her sleep during the complaint period of July 2014 to July 2016.

Mendoza said her father tore down the sunroom at his residence and began rebuilding it in 2015. The sunroom had to be torn down because Lyon had constantly complained to the city and the city told Garcia the sunroom had to be torn down and rebuilt because he did not have a permit for it. Her father's demolition of the old sunroom and construction of the new sunroom was limited to weekends. His nephews helped him, as did his sons on occasion. She said construction started about 9:00 or 10:00 a.m., not before 7:00 a.m. When he worked on the sunroom, Garcia ended work before 5:00 p.m.

Garcia stored the demolition materials behind Mendoza's apartment. There are no garbage cans on the property, only dumpsters.

Rita Cramer was a Code Enforcement Officer for the City of Garden Grove. The city permitted construction work in residential areas between the hours of 7:00 a.m. and 8:00 p.m., Monday through Saturday, and 8:00 a.m. to 8:00 p.m. on Sundays. So long as a building permit existed, the city authorized storage of construction debris on the property.

Suzanne Logan lived next door to Garcia. She opened her windows about 4:00 a.m. and closed them later in the day when it began to get hot. She could hear sounds from the Garcia property, but they were not bothersome. Her windows were opened by 7:00 a.m. on Saturdays. She did not recall hearing any loud noises from the Garcia property between July 2014 and July 2016. Neither did she recall observing Garcia operating a storage yard during that time. Her sleep has never interrupted and her enjoyment of her property was never interfered with by activity on the Garcia property.

DISCUSSION

We review the trial court's ruling on Garcia's motion in limine for an abuse of discretion. (*McMillin Companies, LLC v. American Safety Indemnity Co.* (2015) 233 Cal.App.4th 518, 529 [abuse of discretion review unless "the grant of the motion becomes a substitute for a summary adjudication or nonsuit motion," in which case the de novo standard applies].) "The trial court is 'vested with broad discretion in ruling on the admissibility of evidence.' [Citation.] '[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' [Citation.] '"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]' Moreover, even where evidence is improperly excluded, the error is not reversible unless '"it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.]" [Citation.]' [Citations.]" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.)

When a nuisance is permanent, the statute of limitations begins to run on the date the nuisance is created. (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 106.) The cases finding a nuisance to be permanent in nature have involved solid structures. (*Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal.3d 862, 869.)

If the nuisance can be abated by the defendant simply terminating the complained of action, the plaintiff may plead the action as a continuing nuisance. (*McCoy v. Gustafson*, *supra*, 180 Cal.App.4th at p. 85.) Every repetition of the continuing nuisance is a separate wrong, subject to a new and separate limitation period for which the plaintiff may bring successive actions for damages until the nuisance is abated even though an action based on the original wrong may be barred. (*Ibid.*) A plaintiff cannot receive prospective damages in a continuing nuisance action. (*Baker v. Burbank-Glendale-Pasadena Airport Authority*, *supra*, 39 Cal.3d at p. 869.)

The court precluded Lyon from introducing evidence of liability or damages incurred prior to July 14, 2014, the date two years prior to the filing of the complaint. Lyon argues the court abused its discretion because the two-year statute of limitations, section 335.1, does not apply to continuing nuisance claims. But he does so without citing any authority. If section 335.1 is not applicable, Lyon should have cited what he believes is the applicable statute of limitations. Having failed to do so, he forfeited any argument that section 335.1 does not apply.[3] (Cal. Rules of Court, rule 8.204(a)(1)(B) [argument must be supported by citation of authority where possible]; *Estate of Cairns* (2010) 188 CalApp.4th 937, 949.)

Lyon takes the fallback position that even if two years is the applicable limitations period, evidence dating back to 2003 was still relevant as "background evidence." The initial flaw in this argument is that "background evidence" is not a magic talisman that makes evidence of a continuing nuisance outside the statute of limitations period admissible.

Moreover, the evidence was properly excludable under Evidence Code section 352. While only relevant evidence (see Evid. Code § 210) is admissible (Evid. Code, § 350), a "court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code § 352.) Like other evidentiary rulings, a ruling excluding evidence pursuant to Evidence Code section 352 will be upheld in the absence of an abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

[3] Not only did Lyon fail to cite another statute of limitations in his opposition to the motion in limine below or in his opening brief on appeal, after Garcia again asserted in his respondent's brief that section 335.1 is the applicable statute of limitations, Lyon failed to file a reply brief.

Lyon claims the ruling excluded "all of [his] witnesses" and "75 [percent] of the written exhibits." Considering the length of the trial without this evidence, had it been admitted for background purposes, it seems doubtful the trial could have been concluded in the amount of time the court gave the parties to try the case, i.e., its admission would have necessitated an undue consumption of time, considering its limited, if any, relevance as background evidence. Additionally, admission of the evidence would have created a substantial danger of confusing the issues or misleading the jury. Garcia's acts outside the statutory period could not serve as a basis for liability or in the calculation of damages. Thus, a jury would have heard what Lyon argues was his *best* evidence, but could not have used that evidence in determining liability or damages. As a result, the excluded evidence also presented a substantial danger of prejudicing Garcia because Lyon's most compelling evidence related to conduct outside the statutory period.

Lyon next argues the ruling excluding evidence prior to July 14, 2014, constituted structural error and requires reversal without consideration of prejudice. Our conclusion that the court did not err in its ruling inherently rejects this argument, but we here take the time to specifically respond to Lyon's argument. The only authority cited for this structural error argument is *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281 (*Carlsson*). But *Carlsson* is inapplicable.

In *Carlsson*, the trial court was dissatisfied with the progress of a marital dissolution trial. "After displaying impatience and reluctance in allowing the parties adequate time to complete their presentations, the judge ended the trial while an expert witness for the husband was on the witness stand and counsel was in the midst of asking him a question." (*Carlsson*, *supra*, 163 Cal.App.4th at p. 284.) The judge "abruptly ended the trial before [the husband] had finished his presentation, cutting off any opportunity for rebuttal evidence (other than six questions posed to [his] expert) or

argument of counsel. This method of conducting a trial cannot be condoned in a California courtroom." (*Id*. at p. 291.)

Thus, in *Carlsson* the judge, apparently out of pique, stopped the trial midstream while the husband was still putting on his case-in-chief. (*Carlsson*, *supra*, 163 Cal.App.4th at p. 284.) On the other hand, here, the judge considered the motion in limine and ruled Lyon could not introduce evidence of liability or damages outside of the statute of limitations. The two rulings are not similar in their nature or their effect.

Further, the ruling in *Carlsson* was not based on the Evidence Code. The judge precluded the husband from introducing *any* evidence not already admitted. Thus, husband's right to a trial was violated because he was precluded from having his day in court. And as the court observed, "'Denying a party the right to testify or to offer evidence is reversible per se.' [Citations]" (*Carlsson*, *supra*, 163 Cal.App.4th at p. 291.)

Here, on the other hand, the court permitted Lyon to introduce evidence of liability and damages within the statutory period. The excluded evidence related to times outside the statutory period, times for which no liability could be based and no damages could be awarded. Unlike the situation presented in *Carlsson*, Lyon was permitted to present any evidence he had of a continuing nuisance during the two-year period.

Consequently, Lyon's attempt to create a structural error out of the trial court's evidentiary ruling is unavailing. He had his day in court and he was given the opportunity to introduce evidence of violations during the two-year complaint period. The jury heard his evidence and found for Garcia.

Finally, Lyon complained he was prohibited from introducing evidence the alleged nuisance was continuing during the trial. But a plaintiff is not entitled to damages or relief for conduct occurring after the complaint has been filed. Instead, damages incurred after the complaint is filed are prospective and may only be claimed in a subsequent lawsuit. (*Baker v. Burbank-Glendale-Pasadena Airport Authority*, *supra*, 39 Cal.3d at pp. 868-869.)

DISPOSITION

The judgment is affirmed. Garcia is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

IKOLA, ACTING P. J.

GOETHALS, J.